Supreme Court, U.S.
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No. 01-443

IN THE

Supreme Court of the United States

BANK OF AMERICA, N.A.,

Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

The petition in this case clearly established that the court of appeals deferred under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the interpretation by agency counsel offered in an appellate brief of the critical term in the governing statute even though that interpretation flatly contradicted the one adopted by the agency in notice-and-comment rulemaking. As petitioner will show, the government's efforts to escape this Court's holding in *United States v. Mead Corp.*, 533 U.S. 218, 121 S. Ct. 2164 (2001), that courts should not defer to agency counsel's interpretation of a statute offered for the first time in litigation, are unconvincing.

1. In its usual fashion, the government's brief in opposition to the petition ("Opp.") carefully describes the factual and statutory background of this case. In doing so, however, the government corroborates all of petitioner's central points:

a. The entire predicate for imposing the disputed $28 million assessment at issue here was that petitioner's predecessor, Barnett Bank, had engaged in a "conversion transaction" when it acquired affiliated so-called "Oakar banks" that had themselves previously acquired savings associations, Opp. 3-4, 10, 13;

b. "Conversion transactions" that give rise to continuing liability for "Savings Association Insurance Fund" ("SAIF") assessments all involve mergers or similar transactions between a financial institution that is a "member" of the "Bank Insurance Fund" ("BIF") and another institution that is a "member" of the SAIF, Opp. 3-4, 10, 13;

c. In promulgating the notice-and-comment rule that is the basis for the assessments here, the Federal Deposit Insurance Corporation ("FDIC") interpreted the statutory

term "member" to mean that an Oakar bank is only a member of the BIF and is not a member of the SAIF, Opp. 7-8; and

d. Notwithstanding this construction of the term "member," the FDIC concluded that transactions between Barnett Bank, which indisputably was a member only of the BIF, and Oakar banks, which were also members only of the BIF under the FDIC's own definition of "member," would be regarded as "conversion transactions," because "otherwise the Oakar Amendment [would be] meaningless," and because the agency's approach would be "consistent with the structure and purpose underlying the Oakar Amendment." Opp. 8.

The remainder of the government's opposition is devoted to ill-conceived attempts to obscure the effects of its concessions that the agency itself could not reconcile its imposition of the disputed assessments here with the language of the statute *as the FDIC construed it*.

2. Like the court of appeals' opinion, the government's opposition embodies a fundamental misunderstanding of *Chevron*. Under *Chevron*, courts defer to an agency's interpretation of a statute in two situations. The first is where Congress leaves a "gap" in the statute that it expects the agency to fill. For the reasons demonstrated in the petition (Pet. 7 n.5, 11) – and *not* challenged by the government – the court of appeals could not properly have deferred to the FDIC's interpretation of the statute based on a gap-filling application of *Chevron*.[1]

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[1] The failure of Congress to provide for insurance assessments after transactions between a BIF-member bank and a BIF-member Oakar bank cannot be regarded as a "gap" in the statute that the agency was expected by Congress to fill, even assuming *arguendo* that the FDIC's rule is consistent with the relevant statutory policy. *See Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986) (an agency does not have power to "correct flaws that it perceives in the statute it is (continued. . .)

The other type of *Chevron* deference is where Congress uses an ambiguous term in a statute and the agency adopts a definition of that term to justify its regulation, adjudication or other pronouncement that has legal effect. In these circumstances, courts defer to the agency's construction of the "ambiguous" term as this Court has done in numerous cases.[2] Thus, in *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996) (emphasis added), the Court stated that "the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute *with the implementing agency*." Where the agency has adopted a particular interpretation of an ambiguous provision, *Chevron* does not allow courts to defer to some other interpretation – in this case, agency counsel's.

(footnote continued)

empowered to administer"). In any event, gaps can be filled only through "legislative regulations." *Chevron*, 467 U.S. at 843. Such regulations operate only prospectively. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). In this case, the FDIC's rule is labeled "interpretative" because it was designed to impose retroactive liability upon banks. Here, for example, the FDIC rule was not effective until January 1, 1997, *see* FDIC Final Rule, 61 Fed. Reg. 64960, 64961 (Dec. 10, 1996), whereas the disputed assessments were for 1996. Accordingly, the FDIC – confronted with this argument – did not even contend in the court of appeals that its regulation deserved *Chevron* deference as a gap-filling measure. *But see* Pet. App. 26a where the penultimate sentence of the court of appeals' opinion quoted *Chevron* on gap-filling.

2 *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 255 (1995), which was explicitly endorsed by this Court's decision in *Mead*, 121 S. Ct. at 2173, perfectly illustrates this type of *Chevron* deference. In that case, the disputed term was "insurance" as used in the National Bank Act, 12 U.S.C. § 92, which bars national banks from selling "insurance" in towns of more than 5,000 inhabitants. The Office of the Comptroller of the Currency ("OCC") had concluded that the annuities at issue in that case were not "insurance" within the meaning of the statute and this Court deferred to the OCC's interpretation because it agreed that "insurance" did not unambiguously extend to those annuities.

Here, the court of appeals acknowledged that, given the FDIC's own construction of the term "member" in promulgating the regulation at issue in this case, "the FDIC simply ignored the plain language of the statutory definition of 'conversion transaction' in favor of a more functional interpretation," Pet. App. 17a – an approach that the court properly characterized as "damn-the-statute-let's-be-functional . . .," *id.* at 18a. However, the court of appeals then excused the FDIC's obviously improper statutory construction by disregarding the agency's interpretation of the term "member" – that an Oakar bank was a "member" of only the BIF – when it promulgated the rule upon which the FDIC relies to sustain its assessments against petitioner. In doing so, the court of appeals deferred to statements made by agency counsel to the court that an Oakar bank "can be a member of both the BIF and the SAIF," *id.*, which were admittedly "post hoc, or post-litigation" and "inconsistent with the position the agency took" in promulgating its regulation, *id.* at 19a.

The government's suggestion (Opp. 12-14) that the court of appeals did not defer to the FDIC's "post hoc, or post-litigation" interpretation of the term "member" is plainly wrong. As the government acknowledges in its waiver argument, Opp. 17, *see infra* pp. 5-6, the court of appeals ruled for the FDIC by deferring to the FDIC counsel at "the second step" of its *Chevron* analysis. *See* Pet. App. 25a ("the FDIC's interpretation of the statute . . . was permissible under the highly deferential second step of the *Chevron* analysis"). *See also id.* at 19a-25a, devoting six pages to the relationship of *Chevron* and *SEC v. Chenery Corp.*, 318 U.S. 80 (1943). Of course, the court of appeals would never have discussed *Chevron* step 2 or the implications of agency counsel's interpretation of the statute under *Chenery* unless it was deferring to that interpretation.

3. It is impossible to imagine a clearer departure from this Court's subsequent decision in *Mead.* In

describing the spectrum of judicial responses to agency interpretations of statutes, this Court put at the very bottom an "interpretation advanced for the first time in a litigation brief," which it stated should be accorded "near indifference" by reviewing courts. *Mead*, 121 S. Ct. at 2172. The reason for this "near indifference," of course, is that "Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands." *Bowen*, 488 U.S. at 212 (quoting *Investment Co. Inst. v. Camp*, 401 U.S. 617, 628 (1971)). Here, the court of appeals admitted that the views of the agency's lawyers expressed in court repudiated the FDIC's explicit construction of the ambiguous term "member" in its rulemaking. *See, e.g.*, Pet. App. 18a-19a. Such post-hoc views of the statute do not even qualify for the "near indifference" referred to in *Mead*; they should instead be rejected out of hand.

4. Unable to reconcile the court of appeals' decision with *Mead*, the government manufactures a new *Chevron* requirement – for which no support is cited and none exists – that, because deference to the agency occurs at "step 2" of *Chevron*, petitioner waived its argument by not challenging step 2. The government's theory cannot justify the decision below.

As the court of appeals explained, step 2 entailed an inquiry whether "the FDIC's interpretation [was] consistent with the purpose and intent of FIRREA as a whole" and whether "the policy reflected in the regulation itself . . . has always remained consistent." Pet. App. 25a-26a. There is no reason in the world why petitioner should have been required to argue that the FDIC counsel's approach is inconsistent with the policy underlying the Oakar Amendment in order to complain – as it did in its briefs and rehearing petition – that the court of appeals could not defer to agency counsel's interpretation of the statutory term "member" when it contradicted the agency's interpretation in its notice-and-

comment rulemaking. A court never arrives at *Chevron* step 2 until it has properly identified the agency interpretation of an ambiguity in the statute that allegedly qualifies for *Chevron* deference. *See Mead*, 121 S. Ct. at 2171-72. Here, the court of appeals obviously erred in relying upon FDIC counsel's view of the meaning of the term "member." That being the case, the step 2 inquiry is moot.

Moreover, as previously discussed, Pet. 11-12, petitioner relied upon two of this Court's decisions to support the now fundamental proposition of statutory construction that agencies must respect the language of the statutes that they are charged with administering and may *not* resort to policy in adding features that they regard as "desirable or necessary to protect the public interest," *Dimension Fin. Corp.*, 474 U.S. at 374, or as "achiev[ing] the 'statutory purposes' more effectively," *Director, Office of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 136 (1995). Thus, even assuming the FDIC got the policy right, it clearly got the statutory construction wrong.

5. The striking departure of the court of appeals from this Court's *Chevron* and statutory construction jurisprudence would, standing alone, justify granting the petition. But there is far more to this case. The FDIC does not dispute the enormous sums at issue here and the numerous other transactions that would be affected by a ruling from this Court on the merits. *See* Pet. 12. Indeed, according to this month's press reports, the FDIC estimates that these other transactions may involve more than $600 million in additional assessments under the approach to the Oakar Amendment embraced by the FDIC's rule and upheld by the court of appeals. *See* Rob Blackwell, *Pressing Case, FDIC Says Refund May Hit $1.5B*, AM. BANKER, at 1 (Dec. 10, 2001) (describing the FDIC's potential liability for

lawsuits claiming over-assessments based on treating BIF-Oakar banks as SAIF members).

This Court's review would ensure that these enormous liabilities are not sustained under reasoning that defies the settled principles of administrative law and statutory construction that this Court has taught for the past quarter century.

CONCLUSION

For the foregoing reasons as well as those raised in the petition, the Court should grant the petition.

Respectfully submitted,

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